Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-47 OF 1997
NIK HASHIM JC
26 AUGUST 1997

Civil Procedure *— Mode of commencement — Originating motion — Whether notice of motion must state grounds of the application within the four corners of the notice itself — Whether deficiencies in the notice of motion can be regarded as cured by reason of references in the notice of motion to affidavits attached or accompanying the notice — Whether such affidavit can supply the missing grounds which are required to be set out in the notice of motion — Whether deficiency in the notice of motion amounted to an irregular and thus invalid notice which ought to be struck off — Whether irregularities were cured by amendment to the originating motion — Rules of the High Court 1980 O 69 r 4(2) & O 2 r 1(2)*

Civil Procedure *— Preliminary objection — Notice to opponent — Whether notice of preliminary objection was given within reasonable time — Whether sufficient prior notice of objection was given through the affidavit-in-reply filed — Whether irregularity had thus been waived — Rules of the High Court 1980 O 32 r 13(2)(b)*

The applicant filed an originating motion ('the originating motion') supported by his affidavit to have the arbitrator's award set aside. Subsequently, the respondent filed an affidavit-in-reply affirmed by one Dr Tan Kok Peng. Before hearing the merit of the application, the respondent raised a preliminary objection that the applicant failed to comply with O 69 r 4(2) of the Rules of the High Court 1980 ('the RHC') in not stating the grounds of the application in general terms on the notice of motion. In response, the applicant complained that the notice of preliminary objection was not given within reasonable time, ie the 14-day period fixed under O 32 r 13(2)(b) of the RHC, and therefore any irregularity had thus been waived by the respondent. The issue for the court's consideration was whether the omission of the grounds in the notice of motion was merely an irregularity which was curable under O 2 r 1 of the RHC, ie by reference in the notice of motion to the supporting affidavit of the applicant whereby the grounds of the application were set out in a comprehensive manner, or that the deficiency in the notice of motion amounted to an irregular and thus invalid notice which ought to be struck off. The applicant had earlier filed an application to amend the originating motion.

Held, striking off the motion:

(1) There was sufficient prior notice of objection through the affidavit of Dr Tan Kok Peng filed on behalf of the respondent, and that ample time was given to the applicant before the objection was raised. This conclusion was arrived at based on the rationale that the respondent raised the preliminary objection through an affidavit and not an application to set aside for irregularity under

O 2 r 2(1) of the RHC. As such, the respondent's affidavit-in-reply was not caught within the scope of O 32 r 13(2)(b) of the RHC which is only applicable to interlocutory applications in chambers and not to originating motions as in the present case (see p 171F–H); *Low Chang Hian v Kelab Golf DiRaja Selangor* [1995] 3 MLJ 1.

(2) It is a basic requirement that the notice of motion must contain the grounds. The grounds must be stated within the four corners of the notice itself. Accordingly, deficiencies in the notice of motion cannot be regarded as cured by reason of references in the notice of motion to affidavits attached or accompanying the notice since the affidavit is not a ground but it contains evidence. It is a separate document from the notice and its purpose is merely to verify the facts in the grounds. As such, the affidavit cannot supply the missing grounds which are required to be set out in the notice of motion under O 69 r 4(2) of the RHC. Thus, the notice without grounds was incomplete and irregular and an incomplete notice was as good as no notice at all (see p 172F–H); *Harmsworth v Harmsworth* [1987] 3 All ER 816 and *Sykt M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112.

(3) The defects in the originating motion were irregularities which could be cured by amendment under O 2 r 1(2). However, the omission to state the grounds in the notice was a fundamental and serious irregularity which needed to be amended by formal application in writing. Without amendment, the originating motion remained irregular and invalid.

In this case, the application to make amendment to the originating motion was defective. Instead of inserting the grounds which were missing, the proposed amendments by its very provision sought to introduce further relief, leaving the notice of motion without any grounds and thus it would remain unamended, irregular and invalid. Therefore, there was no valid application before the court to set aside the arbitration award (see p 173B–E).

[Bahasa Malaysia summary

Pemohon memfailkan suatu usul pemula ('usul pemula tersebut') disokong oleh afidavit supaya award penimbangtara diketepikan. Kemudiannya, penentang memfailkan suatu afidavit jawapan yang diikrarkan oleh seorang bernama Dr Tan Kok Peng. Sebelum mendengar merit permohonan, penentang membangkitkan suatu bantahan permulaan bahawa pemohon gagal mematuhi A 69 k 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dalam tidak menyatakan alasan permohonan dalam terma umum atas notis usul. Sebagai jawapan, pemohon mengadu bahawa notis bantahan permulaan tidak diberikan dalam masa yang munasabah, iaitu tempoh 14 hari yang ditetapkan di bawah A 32 k 13(2)(b) KMT, dan oleh itu sebarang luar aturan telah diketepikan oleh penentang. Isu untuk

A pertimbangan mahkamah adalah sama ada peninggalan alasan dalam notis usul cumalah suatu luar aturan yang boleh dipulihkan di bawah A 2 k 1 KMT, iaitu dengan rujukan dalam notis usul kepada afidavit menyokong pemohon di mana alasan permohonan dinyatakan dalam cara yang komprehensif, atau bahawa kecacatan dalam notis usul merupakan suatu notis luar aturan dan justeru itu tidak sah yang patut dibatalkan. Pemohon terlebih dahulu telah memfailkan satu permohonan untuk meminda usul pemula.

Diputuskan, membatalkan usul:

(1) Terdapat notis bantahan terdahulu yang memadai melalui afidavit Dr Tan Kok Peng yang difailkan bagi pihak penentang, dan bahawa masa yang lebih daripada mencukupi telah diberikan kepada pemohon sebelum bantahan dibangkitkan. Kesimpulan ini dicapai berdasarkan rasional bahawa penentang membangkitkan bantahan permulaan melalui satu afidavit dan bukan satu permohonan untuk mengetepi disebabkan luar aturan di bawah A 2 k 2(1) KMT. Oleh yang demikian, afidavit jawapan penentang tidak dirangkumi oleh skop A 32 k 13(2)(b) KMT yang hanya terpakai kepada permohonan interlokutori dalam kamar dan bukan kepada usul pemula seperti dalam kes ini (lihat ms 171F–H); *Low Chang Hian v Kelab Golf DiRaja Selangor* [1995] 3 MLJ 1 diikut.

(2) Adalah satu keperluan asas bahawa notis usul mestilah mengandungi alasan-alasan. Alasan-alasan mestilah dinyatakan dalam empat penjuru notis sendiri. Oleh itu, kecacatan dalam notis usul tidak boleh dianggap telah dipulihkan disebabkan rujukan dalam notis usul kepada afidavit-afidavit yang dilampirkan atau mengiringi notis kerana afidavit bukan suatu alasan tetapi ia mengandungi keterangan. Ia merupakan suatu dokumen yang berasingan daripada notis dan tujuannya cumalah untuk menentusahkan fakta-fakta dalam alasan-alasan. Oleh itu, afidavit tidak boleh membekalkan alasan yang tertinggal yang dikehendaki dinyatakan dalam notis usul di bawah A 69 k 4(2) KMT. Justeru itu, notis tanpa alasan-alasan adalah tidak lengkap dan luar aturan dan suatu notis yang tidak lengkap adalah bagaikan tiada notis sama sekali (lihat ms 172F–H); *Harmsworth v Harmsworth* [1987] 3 All ER 816 dan *Sykt M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112 diikut.

(3) Kecacatan dalam usul pemula adalah luar aturan yang boleh dipulihkan oleh pemindaan di bawah A 2 k 1(2). Namun demikian, peninggalan untuk menyatakan alasan dalam notis adalah luar aturan yang asas dan serius yang perlu dipinda oleh permohonan rasmi secara bertulis. Tanpa pemindaan, usul pemula tersebut tetap luar aturan dan tak sah.

Dalam kes ini, permohonan untuk membuat pemindaan kepada usul pemula tersebut adalah cacat. Daripada memasukkan alasan-alasan yang tertinggal, pemindaan yang dicadangkan

melalui peruntukannya, cuba memperkenalkan relief lanjut, lalu membiarkan notis usul tanpa sebarang alasan dan justeru itu ia tetap tidak dipinda, luar aturan dan tak sah. Maka, tiada permohonan yang sah di hadapan mahkamah untuk mengetepikan award timbangtara (lihat ms 173B–E).]

Notes

For cases on mode of commencement, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2292–2317.

For cases on originating motion, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2324–2332.

For cases on preliminary objection, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2773–2774.

Cases referred to

Harmsworth v Harmsworth [1987] 3 All ER 816 (folld)

Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 (refd)

Low Chang Hian v Kelab Golf DiRaja Selangor [1995] 3 MLJ 1 (folld)

Ooi Chew Seng v Ultratech Sdn Bhd & Ors [1997] 2 MLJ 344 (refd)

Sykt M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112 (folld)

Legislation referred to

Arbitration Act 1952 ss 23, 24

Rules of the High Court 1980 O 2 rr 1, 2(1), O 32 r 13(2)(b), O 52 r 2(2), O 69 r 4(2)

Brian Shanker (*Prakash Metha* with him) (*Prakash Baljit & Co*) for the applicant.

Wong Yee Chua (*Lim Seng Keong* with him) (*Lim Cheng Chuan & Co*) for the respondent.

Cur Adv Vult

Nik Hashim JC: The application in encl 2 is an originating motion to have the arbitrator's award dated 29 January 1997 set aside. The application is made under ss 23 and 24 of the Arbitration Act 1952 and governed by O 69 r 4 of the Rules of the High Court 1980 ('the RHC'). The originating motion is dated 11 March 1997 and supported by the applicant's affidavit. The respondent has filed an affidavit-in-reply affirmed by Dr Tan Kok Peng on 9 May 1997.

Before hearing the merit of the application, the respondent raised a preliminary objection, ie that the applicant failed to comply with O 69 r 4(2) of the RHC in not stating the grounds of the application in general terms on the notice of motion.

Order 69 r 4(2) of the RHC states:

> In the case of *every such application, the notice of motion must state ... the grounds of the application*; and, where the motion is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with that notice. (Emphasis added.)

In the body of encl 2, the applicant merely stated:

> Dan selanjutnya ambil perhatian bahawa alasan-alasan bagi permohonan ini adalah disokong di dalam afidavit Dr Woo Kin Chong yang diikrarkan pada 10 Mac 1997.

Learned counsel for the respondent contended that the provision of O 69 r 4(2) is mandatory and strict compliance is called for, and in the absence of the grounds in the body of the motion, there is no valid application before the court to set aside the award. The following relevant cases were cited in support:

(i) *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344;

(ii) *Sykt M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112;

(iii) *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303.

Learned counsel for the applicant complained that the notice of preliminary objection was not given within reasonable time within the 14-day period fixed under O 32 r 13(2)(b) of the RHC, and therefore any irregularity had thus been waived by the conduct of the respondent. He further argued that the objection was highly technical in nature, and as such, compliance with O 69 r 4(2) need not be strictly enforced. According to him, the omission of the grounds in the motion is merely an irregularity which is curable under O 2 r 1 and urged the court to proceed hearing the case on its merits.

With regard to the objection to the notice of preliminary objection, I am satisfied that there was a sufficient prior notice of objection through the affidavit of Dr Tan Kok Peng filed on behalf of the respondent, and that ample time was given to the applicant before the objection was raised (see *Ooi Chew Seng*). What the respondent did in this case was that he raised the preliminary objection through an affidavit and not an application to set aside for irregularity under O 2 r 2(1). Thus, the respondent's affidavit-in-reply was not caught within the scope of O 32 r 13(2)(b) which is only applicable to an interlocutory application in chambers and not to an originating motion as in the present case (see *Low Chang Hian v Kelab Golf DiRaja Selangor* [1995] 3 MLJ 1).

The applicant's counsel contended that the respondent is not prejudiced or embarrassed by the non-compliance and that the grounds of the application have been set out in a comprehensive manner in the supporting affidavit of Dr Woo Kin Chong.

By analogy, the case of *Sykt M Mohamed v Mahindapal Singh & Ors* is illuminative of the requirement for the grounds in the notice of motion. In that case, the plaintiff applied by motion to commit the first and second defendants to prison for contempt of court for breach of injunction. In the statement accompanying the notice of motion, the plaintiff failed to state

the grounds on which an order of committal is sought as required by O 52 r 2(2) of the RHC. In that case, KC Vohrah J in the course of his judgment referred to the English case of *Harmsworth v Harmsworth* [1987] 3 All ER 816, where Nicholls LJ underscored the principle that deficiencies in the notice of motion cannot be regarded as cured by reason of references in the notice of motion to affidavits attached to or accompanying the notice. The learned British judge at p 821 said:

> But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. .... the rules require that the notice itself must contain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself.

KC Vohrah J in dismissing the motion in *M Mohamed*'s case at p 115 said:

> No doubt the notice of motion has made reference to the affidavit of Moiz Tahir Ali and the affidavit has been served on the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r 2(2) of O 52 of the RHC.

With respect, I agree with the ruling of the learned judge in that case and would apply the same principle to the present case. Though that case was quasi-criminal in nature, that does not make it less imperative to comply with the rules in a case that is purely civil in nature. In my view, a motion under O 69 r 4 of the RHC is synonymous to an appeal. Order 69 r 4(2) is a special provision relating to an application to remit or set aside an award of an arbitrator. By its terms, the provision under the rule is mandatory and therefore obligatory. That being so, strict compliance with its provision is called for (*Ooi Chew Seng*'s case). Accordingly, the notice of motion must contain the grounds. This is a basic requirement. The grounds must be stated within the four corners of the notice itself. Affidavit is not a ground, but it contains evidence. It is a separate document from the notice and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the notice of motion under r 4(2) of O 69 of the RHC. The rule requires only grounds in general terms to be stated in the notice itself. The notice without the grounds is incomplete and irregular. An incomplete notice is as good as no notice at all. One of the reasons for the grounds is because an arbitration award is considered to be final and can only be challenged on very limited grounds. If upon perusing the grounds stated on the notice, it is found that there are no valid grounds, the court need not go into the affidavit evidence and exercise a minute examination to see whether the application should be granted but could instead dismiss the application outright. Counsel for the applicant said that the rule only requires that the grounds should be stated in general terms but the applicant has in fact set out such grounds in a comprehensive manner in the supporting affidavit. The function of an affidavit is to contain evidence

A and an affidavit which purportedly contains grounds in a comprehensive manner is a far cry from a notice of motion which requires the grounds to be in general terms. Obviously, there are reasons why the rule requires grounds to be stated in general terms and not in a comprehensive manner.

In this case, however, the applicant has filed an application in encl 8 B to make amendment to the originating motion in encl 2 by supplying the missing grounds in encl 2. By so doing, the applicant has acknowledged the defects. But unfortunately, encl 8 itself is defective. Instead of inserting the grounds which are missing, the proposed amendments by its very provision, seek to introduce further relief leaving the notice of motion in encl 2 without any grounds and thus it remains unamended. Therefore, C encl 8, being itself defective, cannot cure encl 2. The defects in encl 2 are irregularities which can be cured by amendment under O 2 r 1(2). However, the omission to state the grounds in the notice is a fundamental and serious irregularity which needs to be amended by formal application in writing. Without amendment, encl 2 remains irregular and invalid. In the D present case, the court is not prepared to accept encl 2 as a valid application without amendment. By filing the defective application in encl 8, the applicant did not avail himself of the opportunity to regularize the application in encl 2. Accordingly, I agreed with the submission of counsel for the respondent that in the absence of the grounds, there is no valid application before the court to set aside the arbitration award. In the event, E I allowed the preliminary objection of the respondent and struck off the originating motion in encl 2 with costs and further ordered that encl 8, being itself irregular, also be struck off with costs.

Motion struck off.

F

Reported by Jacob Ting

G

H

I